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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 407

JOHN S. SERVICE,

Petitioner,

v.

JOHN FOSTER DULLES, ET AL.,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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September 1956

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No.

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Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The petitioner, John S. Service, prays that a writ of certiorari issue to the United States Court of Appeals for the District of Columbia Circuit.

Opinions Below

The opinion of the Loyalty Security Board of the Department of State is printed at R. 12-29.[1] The opinion of the Loyalty Review Board is printed at R. 1-11. The opinion

[1] References to the record "(R. —)" are to the Joint Appendix as printed in the court below (R. 1-91). The certified transcript contains also the proceedings in the Court of Appeals (R. 92-102).

of the District Court is unreported and is printed at R. 85-88. The opinion of the Court of Appeals (R. 92-98) is not yet reported and is printed as Appendix B to this petition, *infra*, pp. 66-72.

Jurisdiction

The judgment of the Court of Appeals was entered June 14, 1956 (R. 99). The jurisdiction of this Court is invoked under 28 U. S. C. Section 1254(1).

Questions Presented

1. Whether the Secretary of State can validly exercise his statutory discretion to discharge petitioner by acting solely on the findings and opinion of the Loyalty Review Board in a case where the Board had no jurisdiction and where the Board's procedures in critical respects violated both the Fifth Amendment and the Executive Order under which it purported to act.

2. Whether the Secretary of State can validly exercise his statutory discretion to discharge government employees in the interest of the United States without following the procedures prescribed for such action by his own regulations.

Statutes, Regulations and Constitutional Provisions Involved

This case involves:

(1) The Fifth Amendment to the Constitution of the United States printed in Appendix A, *infra* p. 24.

(2) The so-called McCarran Rider to various State Department Appropriation Acts (60 Stat. 458, 61 Stat. 288, 62 Stat. 315, 63 Stat. 456, 64 Stat. 768), printed in Appendix A, *infra* p. 24.

(3) Executive Order 9835 (12 Fed. Reg. 1935) printed in Appendix A, *infra* p. 25, as amended by Executive Order 10241 (16 Fed. Reg. 3690) printed in Appendix A, *infra* p. 33.

(4) Department of State Regulations and Procedures relating to Loyalty and Security of Employees, (a) as adopted March 11, 1949, printed in Appendix A, *infra* p. 33, and (b) as revised May 4, 1951 and September 21, 1951, printed in Appendix A, *infra* p. 46.

Statement of the Case

The case comes to this Court from the affirmance of a judgment in the trial court which granted part of the relief sought by the petitioner but denied his motion for summary judgment and granted respondents' cross-motion. Neither party introduced testimony in the trial court. Save for such reference to the transcript of hearing before the Department of State Loyalty Security Board as is necessary to explain how this case arose,[2] the statement which follows is therefore based on the facts pleaded in the third amended complaint (R. 40) and admitted in the answer (R. 62), the admissions of respondents (R. 68), the affidavit of petitioner accompanying his motion for summary judgment (R. 71), and the affidavit of the former Secretary of State accompanying the respondents' cross-motion (R. 81).

From October 1935, until December 14, 1951, petitioner served continuously as a Foreign Service Officer of the United States, advancing by promotion to Class 2 of the Foreign Service (R. 41, 63). All of his service as a Foreign Service Officer between 1935 and 1945 was in China. He was rated by Ambassador Gauss, the last Ambassador under whom he served in China, as "one of the ablest and most promising younger officers of the China corps and the serv-

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[2] The transcript of hearing before the departmental Loyalty Security Board is printed in the Hearings before a Subcommittee of the Committee on Foreign Relations, United States Senate, 81st Cong., 2d Sess., pursuant to S. Res. 231, pp. 1958-2509, hereinafter referred to as the "Tydings Committee Hearings."

ice in general."[3] From 1943 to 1945 he was assigned to duty as a political reporter with the United States Army in China and in 1944 and 1945 was sent as an observer for the Army to Chinese Communist Army headquarters in Yenan.[4] The Loyalty Security Board of the Department of State found petitioner's reports to be "objective, and extraordinarily accurate as political forecasts of what was to come" (R. 16). It was a part of petitioner's duties while assigned to the Army to supply background material to American newspapermen in China, including, in his discretion, material from his own reports.[5]

In April 1945, on termination of his Army assignment and shortly after his return to the United States, petitioner lent a few of his personal copies of his reports to one Philip Jaffe, editor of Amerasia magazine; those selected by Service, according to the State Department Loyalty Security Board, "contained nothing that could be considered harmful to the national security" (R. 25). Jaffe at the time was under close surveillance by the F. B. I. (R. 21). In June 1945 petitioner, Jaffe, and four others were arrested by the F. B. I. on warrants charging conspiracy to violate the Espionage Act. Petitioner appeared and testified before a federal grand jury in August 1945, and the jury thereafter voted unanimously not to indict him.[6]

From the time of his arrest, petitioner had been on leave of absence with pay. When the grand jury found no basis for an indictment against him, Secretary of State Byrnes, acting on the recommendation of the Foreign Service Personnel Board, on August 14, 1945, restored him to active duty; he predicted "a continuance of the splendid record I am advised you have maintained since first you entered

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[3] Tydings Committee Hearings, p. 2067.
[4] *Ibid.*, pp. 1962-1974.
[5] *Ibid.*, pp. 2005-2006, 2095-2098; R. 24.
[6] *Ibid.*, pp. 2234-2237, 2290, 2347.

the Foreign Service"[6], while Under Secretary Grew on the same day wrote his pleasure that petitioner was returning to Far Eastern duty "where you have established an enviable record for integrity and ability."[7] In May 1948 petitioner was promoted to Class 2 in the Foreign Service.[8]

The Department of State reviewed petitioner's case a number of times over the next five years, and cleared him in 1945, 1946, 1947 and 1949.[9] In early 1950 the favorable decision of the Department Loyalty Security Board in 1949 was under "post-audit" review by the Loyalty Review Board (R. 1, 33). On January 5 and February 20, 1950, petitioner was attacked on the Senate floor.[10] On March 3, 1950, a panel of the Loyalty Review Board acting on "post-audit" recommended that petitioner's case be "remanded" to the Department. The accusing Senator so advised the Tydings Committee on the morning of March 14, 1950.[11] By letter dated March 14, 1950, the Loyalty Review Board directed the Department of State Loyalty Security Board to reconsider petitioner's case and to hold a hearing on charges (R. 12). On March 16, 1950, petitioner, who was then aboard ship en route to his assignment as Officer in Charge at Calcutta, was directed to return to Washington.[12]

On March 24, 1950, the Chairman of the Department of State Loyalty Security Board sent to petitioner a letter of charges. This letter (R. 28) referred to the 1950 McCarran Rider, authorizing the Secretary of State "in his absolute discretion" to discharge any employee in the Department "whenever he shall deem such termination necessary or advisable in the interests of the United States," to Executive

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[7] *Ibid.*, pp. 2347-2348.

[8] *Ibid.*, p. 2385.

[9] Testimony in February 1949 before House Sub-Committee on Appropriations, Hearings. 81st Cong., 1st Sess., p. 298.

[10] Tydings Committee Hearings, p. 1902; 96 Cong. Rec. 1956.

[11] *Ibid.*, p. 131.

[12] *Ibid.*, p. 1905.

Order 9835, and to the Department's Regulations and Procedures of March 11, 1949, relating to Loyalty and Security of Employees, a copy of which was enclosed. The letter stated that the charges were based on Sections 392.2(f) [suspect associations as evidence of disloyalty] and 393.1(d) [suspect associations as evidence of security risk] of said Regulations and Procedures. It advised that a hearing would be held on these charges to determine whether petitioner's employment should be terminated in the interests of the United States.

After 15 days of hearings, the Loyalty Security Board on October 24, 1950, found (a) that petitioner was neither disloyal nor insubordinate in his relations to former Ambassador Hurley; and (b) that, although petitioner had been indiscreet in lending his reports to Jaffe, the circumstances of these disclosures contained no evidence of disloyalty, and that the experience suffered by petitioner as a consequence of this indiscretion "has served to make him far more than normally security conscious." Accordingly, the Board concluded (1) that reasonable grounds did not exist for the belief that petitioner was disloyal to the United States and (2) that petitioner did not constitute a security risk (R. 14-28). These findings and conclusions of the Loyalty Security Board were approved by the Deputy Under Secretary of State (Administration) pursuant to authority delegated to him by the Secretary of State (R. 42-43, 63).

The Loyalty Review Board, again acting by way of "post-audit," returned the case to the Department of State (R. 33). Executive Order 10241 was issued on April 28, 1951, to amend the loyalty standard previously established by Executive Order 9835. The departmental Loyalty Security Board again considered petitioner's case, under the new and stricter standard, and on July 31, 1951, determined that "no reasonable doubt exists as to his loyalty to the United States" (R. 42, 63). These findings and conclusions of the

Loyalty Security Board were also approved by the Deputy Under Secretary of State (Administration) (R. 42-43, 63).

By letter of October 11, 1951 (R. 78) the Loyalty Review Board of the Civil Service Commission advised petitioner that it had again conducted a "post-audit" of his case pursuant to Regulation 14 of the Loyalty Review Board,[13] and had determined that the Loyalty Review Board would itself conduct a new hearing "upon the charges heretofore issued to you by the Department of State Loyalty Security Board." A hearing was held before a panel of the Loyalty Review Board on November 8, 1951. Since the Loyalty Review Board admittedly had no jurisdiction over matters of security, this hearing was confined to the question of petitioner's loyalty. In addition to interrogating petitioner about the lending of his reports to Jaffe, the Review Board panel had before it, but would not allow petitioner to see, summaries or digests supplied by the F. B. I. of recordings made by the F. B. I. of conversations between petitioner and Jaffe (R. 74). On December 12, 1950, the Loyalty Review Board panel issued an opinion finding (a) that there was no evidence of communist affiliations, but (b) that petitioner had lent some of his reports to Jaffe and in his conversations with Jaffe had disclosed other information which the Board considered confidential; from this it concluded that there was a reasonable doubt as to petitioner's loyalty, and directed that the favorable finding of the departmental Loyalty Security Board be "reversed" (R. 1-11).

On December 13, 1951, the Chairman of the Loyalty Review Board directed a letter to the Secretary of State transmitting the opinion of the panel, reciting the Loyalty Review Board's "opinion" that petitioner should forthwith

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[13] Regulation 14 as it then read (13 Fed. Reg. 255, as amended 13 Fed. Reg. 9366) is set out in the Board's letter (R. 78-79). It was later amended (17 Fed. Reg. 631) to read as set out in *Peters v. Hobby*, 349 U. S. 331, 341, 342 (1955).

be removed from service, and concluding: "Please advise the Loyalty Review Board of the effective date of the removal of said employee, John Stewart Service" (R. 33-35). On the same day, petitioner's attorney was advised by letter from the Chairman of the Loyalty Review Board that the Board had "reversed" the finding of the departmental Loyalty Review Board (R. 80). Petitioner and his attorney immediately sought and at about 6:00 P. M. that same day obtained an interview with the Deputy Under Secretary of State (Administration). Petitioner requested that any action be withheld at least for twenty-four hours until he could address an appeal to the Secretary of State or a request for reconsideration to the Loyalty Review Board. The Deputy Under Secretary declined to withhold immediate action, stating that the determination to separate petitioner from the Foreign Service had already been reached, that the decision of the Loyalty Review Board was binding on the State Department, and that members of the press had been notified some two hours earlier that a public statement was about to be issued on the case (R. 72). This notice was given the press within four hours after receipt of the Loyalty Review Board opinion within the Department (R. 50, 66, 72). At the same time the Deputy Under Secretary gave petitioner a copy of a press release, which was issued by the Secretary of State later on December 13. That press release (R. 35-37) said in part:

> The Chairman of the Loyalty Review Board has requested the Secretary of State to advise the Board of the effective date of the separation of Mr. Service. This request stems from the provisions of Executive Orders 9835 and 10241—which established the President's Loyalty Program—and the Regulations promulgated thereon. Those Regulations are binding on the Department of State.

> The Department has advised the Chairman of the Loyalty Review Board that Mr. Service's employment has been terminated.

At this time the Regulations of the Loyalty Review Board (13 Fed. Reg. 9372; 5 CFR Section 220.4(d)) provided: "It is necessary that the head of an agency follow the recommendation of the Loyalty Review Board in all cases." The 1949 Department of State Regulations and Procedures relating to Loyalty and Security of Employees provided in Section 391.2 that the Regulations of the Loyalty Review Board "constitute the basic and controlling regulations to govern all loyalty adjudication procedures in the Department of State." They also provided in Section 396.4: "If, after consideration of a case, the Loyalty Review Board makes an advisory recommendation to the Secretary of State that the officer or employee should be removed from employment under the loyalty standard referred to in Sec. 392, the Department will take prompt administrative action to remove him from employment." The revised Department Regulations and Procedures of 1951, which have never been published and of which petitioner was unaware until this proceeding reached the courts, contain the same provision with slight modification.[14]

On December 14, 1951, petitioner received a letter from the Deputy Under Secretary (Administration), dated December 13, advising him that the Loyalty Review Board had found, as a consequence of his unauthorized disclosure of documents and information, that there was a reasonable doubt as to his loyalty, and that pursuant to that finding

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[14] Section 396.4 of the 1951 regulations is made applicable to adverse loyalty determinations by the Loyalty Review Board "on appeal." But neither the 1949 nor the 1951 regulations of the Department of State make any express provision for disposition of cases following the Review Board's unlawful "post-audit."

his employment was terminated as of the close of business December 14, 1951, "under the authority of Executive Order 9835, as amended, and Section 103 of Public Law 188, 82d Congress" [the then-current McCarran Rider] (R. 75). The Department's Notice of Personnel Action, dated December 17, 1951, states that the terminating action was taken "pursuant to the decision of the Loyalty Review Board," and cites as "termination authority" Executive Order 9835 and the McCarran Rider (R. 84). Petitioner thereafter sought clarification of the reason for termination of his services and on December 27, 1951, was advised by letter from the Deputy Under Secretary "that your employment was terminated solely as a result of the aforementioned finding of the Loyalty Review Board" (R. 76).

Petitioner after vain efforts to obtain reconsideration by the Loyalty Review Board and the Civil Service Commission [15] instituted the present action. His third amended complaint asked for a declaratory judgment that his separation from service was invalid, that all defendants be directed to expunge from their records all written statements reflecting that petitioner's employment had been terminated on the ground that there was a reasonable doubt as to his loyalty to the United States, and that the Secretary of State be directed to reinstate petitioner to his employment and former grade in the Foreign Service with full restoration of property rights and payment of accumulated salary (R. 59-61). Following the Government's answer, both parties filed motions for summary judgment (R. 70, 80). To the Government's motion was attached the affidavit of the

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[15] The complaint alleges and the answer admits that petitioner "has in every respect exhausted every administrative remedy available to him" (R. 51, 66). The motion to vacate and reconsider was filed with the Loyalty Review Board on December 20 and denied on January 7, 1952; it urged the Board's lack of authority to reverse a favorable Departmental decision. Exs. J and K to complaint. The request for review by the Civil Service Commission was filed January 7 and denied April 1, 1952 (R. 38).

former Secretary of State (R. 81); it was dated January 19, 1953, and said in material part:

> 3. On that same day [December 13, 1951] I considered what action should be taken in the light of the opinion of the Loyalty Review Board, recognizing that whatever action taken would be of utmost importance to the administration of the Government Employees Loyalty Program. I understood that the responsibility was vested in me to make the necessary determination under both Executive Order No. 9835, as amended, and under Section 103 of Public Law 188, 82d Congress, as to what action to take.
>
> 4. Acting in the exercise of the authority vested in me as Secretary of State by Executive Order 9835, as amended by Executive Order 10241, and also by Section 103 of Public Law 188, 82d Congress (65 Stat. 575, 581), I made a determination to terminate the services of Mr. Service as a Foreign Service Officer in the Foreign Service of the United States.
>
> 5. I made that determination solely as the result of the finding of the Loyalty Review Board and as a result of my review of the opinion of that Board. In making this determination, I did not read the testimony taken in the proceedings in Mr. Service's case before the Loyalty Review Board of the Civil Service Commission. I did not make any independent determination of my own as to whether on the evidence submitted before these boards there was a reasonable doubt as to Mr. Service's loyalty. I made no independent judgment on the record in this case. There was nothing in the opinion of the Loyalty Review Board which would make it incompatible with the exercise of my responsibilities as Secretary of State to act on it. I deemed it appropriate and advisable to act on the basis of the finding and opinion of the Loyalty Review Board. In deter-

mining to terminate the employment of Mr. Service, I did not consider that I was legally bound or required by the opinion of the Loyalty Review Board to take such action. On the contrary, I considered that the opinion of the Loyalty Review Board was merely an advisory recommendation to me and that I was legally free to exercise my own judgment as to whether Mr. Service's employment should be terminated and I did so exercise that judgment.

6. Attached to this affidavit * * * are copies of Notice of Personnel Action * * * which correctly reflect the action taken to terminate Mr. Service's employment.

One day before this case was argued in the District Court, this Court in *Peters* v. *Hobby*, 349 U. S. 331, held invalid Regulation 14 of the Loyalty Review Board, a decision of a panel of the Board thereunder following a "post-audit" hearing, and a decision of a department head based on the Review Board's decision, on the ground that the reviewing authority of the Loyalty Review Board was confined by Executive Order 9835 to cases of "persons recommended for dismissal on grounds relating to loyalty by the Loyalty Board of any Department or Agency."

On authority of the *Peters* case, the District Court declared the action of the Loyalty Review Board a "nullity" and directed the Civil Service Commission to expunge from its records the Board's finding that there was a reasonable doubt as to petitioner's loyalty. But with respect to the other relief sought by petitioner, the District Court granted summary judgment for respondents (R. 89). The Court of Appeals affirmed (R. 92).

Reasons for Granting the Writ

The Court of Appeals has held: (a) that the Loyalty Review Board, acting in a lawless assumption of jurisdic-

tion and upon tainted evidence, can supply the sole basis for a lawful exercise of discretion by the Secretary of State; and (b) that the Secretary of State is free completely to disregard both his own procedural regulations and the Department's representations to petitioner as to the manner in which his discretion is to be exercised.

The result is a decision in conflict with *Peters* v. *Hobby*, 349 U. S. 331, and with the cases in this Court and in the Courts of Appeals which since *Perkins* v. *Elg*, 307 U. S. 325, have held that executive discretion must be exercised in accordance with law and in accordance with the agency's own regulations.

Our reasons in detail are:

1. *The Loyalty Review Board Opinion was Lawless.* It is indisputable that petitioner could not lawfully be discharged on the basis of the findings and opinion of the Loyalty Review Board. These were entered on a "post-audit" and hearing, each conducted on the Board's own motion, after a favorable decision by the Department. This conduct was "administrative lawlessness." *Peters* v. *Hobby, supra*, 345.[16]

The Board, moreover, rested its decision chiefly upon summaries of four intercepted conversations between peti-

[16] The suggestion in *Peters* (p. 345) was that the President might have withheld post-audit jurisdiction from the Loyalty Review Board so that the employee would be "assured that his fate would not be decided by political appointees who perhaps might be more vulnerable to the pressures of heated public opinion." The Loyalty Review Board here directed the Department to issue charges against petitioner shortly after petitioner had been denounced on the Senate floor: the accusing Senator seems to have had advance knowledge of this directive (*supra*, p. 5); and a transcript of the Board's minutes of February 14, 1951, as read on the Senate floor, shows that in the period of its remand of petitioner's case to the Department of State the Board was expressing great concern that the State Department Loyalty Security Board had not recommended the discharge of enough employees; "the program simply does not work in that Department" (98 Cong. Rec. 192-193).

tioner and Jaffe, and denied to petitioner any information as to their content (R. 4, 5, 6, 8, 10, 11). The transcript of the one conversation ever made available to petitioner (in a Congressional hearing) shows on its face that it is incomplete and in substantial part unintelligible.[17] There is no conceivable reason of security why an accused cannot know and explain what he is supposed to have said. There is every reason of rudimentary fairness why this purported evidence should be made available to him. Reliance on this sort of secret evidence violates both the Fifth Amendment to the Constitution and Executive Order No. 9835 itself, *infra*, p. 28.

2. *The Secretary Relied Solely Upon the Lawless Findings and Opinion.* The contemporaneous evidence was unmistakable that petitioner was discharged in automatic consequence of this unlawful action of the Loyalty Review Board. That Board said that it "reversed" the departmental Board; it requested of the Secretary advice "of the effective date of removal of said employee;" its regulations provided "It is necessary that the head of an agency follow the recommendations of the Loyalty Review Board in all cases;" the Department's own regulation advised that upon adverse decision of the Loyalty Review Board "the Department will take prompt administrative action to remove" the employee; its Deputy Under Secretary advised peti-

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[17] Tydings Committee Hearings, 1404. The stenographer described one passage as "(unintelligible)", added a word in a vain effort to make one sentence intelligible, inserted his own doubts by "(?)", put in a reference to "Petroff (ph) the new Soviet Ambassador" when no known Soviet Ambassador to China or America has had a remotely similar name, and attributed to petitioner a quotation from an unknown "Award (ph)." He has Service relaying the astounding information (contradicted in the very conversation) that "Hurley's fighting Chungking." The Loyalty Review Board mangles this tapped conversation still further by translating "military plans" into troop dispositions (R. 8) when in context the "plans" related only to political recognition by the military of both Chiang Kai-Chek and the Communists.

tioner orally that under the Loyalty Review Board action the Department was "required" to remove petition, and by letter that "Your employment was terminated solely as a result of the above mentioned finding of the Loyalty Review Board;" the Secretary's press release said the Loyalty Review Board regulations "are binding on the Department;" and the formal personnel action, said by the Secretary in his affidavit to be correct, described petitioner's removal as "pursuant to the decision of the Loyalty Review Board" (*supra*, pp. 8-10).

It developed only when the former Secretary's affidavit was filed in this action, some 14 months later, that he himself had in this respect a sounder knowledge of his responsibilities than did his Department. That affidavit explains that he recognized at the time that the responsibility of decision was vested in him and that he was not legally bound by the opinion of the Loyalty Review Board[18] (*supra*, pp. 11-12). The respondents, however, are not aided, for the former Secretary, with commendable candor goes on to say—

> 5. I made that determination solely as the result of the finding of the Loyalty Review Board and as a result of my review of the opinion of that Board. In making this determination, I did not read the testimony taken in the proceedings in Mr. Service's case before the Loyalty Review Board of the Civil Service Commission. I did not make any independent determination of my own as to whether on the evidence submitted before those boards there was a reasonable doubt as to Mr. Service's loyalty. I made no independent judgment on the record in this case. There was nothing in the opinion of the Loyalty Review Board which would

[18] The Court of Appeals for the District of Columbia so held on October 16, 1952. *Kutcher* v. *Gray*, 199 F. 2d 783.

make it incompatible with the exercise of my responsibilities as Secretary of State to act on it. I deemed it appropriate and advisable to act on the basis of the finding and opinion of the Loyalty Review Board.

In *Peters*, the majority of this Court assumed that the Secretary acted on the basis of the unlawful opinion of the Loyalty Review Board (349 U. S. at 337, 348); the dissenting Justices found nothing to show that this opinion was treated by the Secretary as anything more than recommendation (349 U. S. at 356). Here there is no such ambiguity. The Court in this case, as it did not in *Peters*, has the Secretary's affidavit that he considered himself free to disregard the Loyalty Review Board decision. But it also knows from that affidavit, as it did not in *Peters*, that the Secretary based his action *solely* on that unlawful decision. His affidavit makes it plain that, had he known the decision of the Loyalty Review Board to be a nullity, he would have had nothing at all to support his removal of petitioner; this is most simply tested by reading paragraph 5 of the affidavit with the descriptive word "invalid" or "unlawful" inserted before each reference to the finding or opinion of the Loyalty Review Board.

If we put aside the Secretary's violation of his procedural regulations (*infra*, p. 17), the case is this: The Secretary took discretionary action but based it solely upon findings and an opinion of the Loyalty Review Board which represented a lawless assumption of jurisdiction and rested in chief part upon an unlawful use of secret and grossly unreliable evidence.

Executive discretion which is based solely upon unlawful considerations is an abuse of discretion, and should under the decisions of this Court have been set aside by the courts below. In *Perkins* v. *Elg*, 307 U. S. 325, 349-350, the Court directed that mandamus issue to the Secretary of State to

reconsider his discretionary denial of a passport because it had been based upon an error of law as to the applicant's citizenship.[19] In *Securities Commission* v. *Chenery Corporation*, 318 U. S. 80, 95, the Court held that, while the "exercise of administrative discretion" need not be justified "in any particular manner or with artistic refinement," it "cannot be upheld unless the grounds upon which the agency acted is exercising its powers were those upon which its action can be sustained. In *Accardi* v. *Shaughnessy*, 347 U. S. 260, the Court reversed a denial of habeas corpus to an alien whose deportation the Board of Immigration appeals refused to suspend; the Board's decision was wholly discretionary but was taken in the light of the Attorney General's listing of the alien as an "unsavory character" who should be deported. *Anti-Fascist Committee* v. *McGrath*, 341 U. S. 123, held that the Attorney General may not arbitrarily and without a hearing list an organization as subversive, even though the listing is merely a step in procedures looking to discretionary discharge.

3. *The Secretary in Discharging Petitioner Violated His Own Regulations.* The petitioner was charged, tried and ultimately removed as a loyalty and security risk. Throughout the proceedings the Department's underlying authority was based upon (a) Executive Order No. 9835 which as amended by Executive Order 10241 authorizes removal for "a reasonable doubt as to the loyalty of the person"; and (b) the McCarran Rider which authorized the Secretary "in his absolute discretion" to "terminate any employment" whenever he shall deem such termination necessary or ad-

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[19] The Court of Appeals for the District of Columbia has on several recent occasions ruled that the Secretary of State cannot base a discretionary denial of a passport upon invalid evidence or procedure. *Schachtman* v. *Dulles*, 225 F. 2d 943; *Boudin* v. *Dulles* (June 28, 1956; 6 Pike & Fisher Ad. Law 2d, 289); *Kraus* v. *Dulles* (July 5, 1956; *idem*, 293).

visable in the interests of the United States."[20] The Executive Order required specified procedures. The McCarran Rider itself required no procedural safeguards. But the Department's regulations, in Sec. 391.3, provided (*infra*, p. 34) that "In the exercise of this right [of discretionary discharge] the Department will, so far as possible, afford its employees the same protection as those provided under the Loyalty Program."[21] The formal letter of charges preferred against petitioner by the Chairman of the Department Loyalty Security Board, "for the Secretary of State", represented to petitioner in unmistakable terms that the Secretary's determination as to the necessity or advisability of petitioner's discharge "in the interests of the United States" would follow upon the Loyalty Security Board's recommendations as to whether petitioner was a security risk or of doubtful loyalty. (R. 29, 30.)

There can be no doubt that petitioner was proceeded against under the 1949 regulations of the Department. The charges were based on those regulations (R. 29). Those regulations were sent petitioner with the letter of charges (R. 29, 30). The hearing was scheduled under Section 393 of those regulations (R. 29). The Department of State Loyalty Security Board noted that "the issues here are (1) loyalty, and (2) security risk" (R. 23). The Deputy Under Secretary, who was authorized to review this determination by Sections 395.6 and 396.7 of the 1949 regulations, on at least three occasions did so and approved the Loyalty

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[20] As petitioner was a Foreign Service officer, entitled by statute (22 U.S.C. Secs. 1007, 1008) to procedural protections different from those under the Loyalty-Security program, the McCarran rider was a necessary supplement to the Department's authority if it was to proceed under the Loyalty-Security regulations.

[21] By his letter of September 6, 1950 to the Secretary of State (R. 90), the President in effect directed the Secretary to exercise his absolute discretion under the McCarran rider subject to the procedural guarantees of the Act of August 26, 1950 (5 U. S. C. Sec. 22-1).

Security Board decision (R. 33, 42-43, 63). The Loyalty Review Board post-audit, hearing and "reversal" was asserted only under the Executive Order.

Not until the Government's brief was filed with the District Court was there any suggestion that petitioner was removed only under the McCarran rider, and quite independently of the Executive Order and of the Department's procedural regulations. The respondents' argument, although substantially accepted by the courts below, puts the Secretary and the Department in the unattractive position of promising to petitioner that his case was being heard on specified charges and under described procedures and subsequently urging to the courts that both the charges and the procedures were quite immaterial to his removal. The argument, moreover, is squarely contradicted by every relevant word of the record, and flies in the teeth of the affidavit of the former Secretary who says that he acted *both* under the Executive Order and the McCarran rider, and nowhere asserts that petitioner was removed only "in the interests of the United States" under the McCarran rider (R. 82).

Whether or not the Secretary of State *could* otherwise have removed petitioner under the McCarran rider without charges, hearing, evidence or reason, the fact is that he did not do so, but purported to extend, with respect both to the McCarran rider and the Executive Order, the procedural protections of his regulations. The Court "in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency." *Securities Comm'n.* v. *Chenery Corp.*, 332 U. S. 194, 196. The courts below, in assuming that the Secretary exercised his discretion in a vacuum and without reference to the Departmental procedures under which petitioner

was charged and his case heard, have followed the Government briefs in preference to the record.

The 1949 regulations, under which petitioner was charged and tried,[22] were in two respects violated by his removal. (a) Under Sec. 395.6, a favorable decision of the Loyalty Security Board was to be reviewed by the Deputy Under Secretary and, if approved, the case was to be closed. The petitioner three times received a favorable decision from the Loyalty Security Board which was reviewed and approved by the Deputy Under Secretary. Under the regulations, his case was closed. In fact, it was three times reopened by a lawless exercise of "post-audit" jurisdiction by the Loyalty Review Board, and the Secretary finally intervened in the case solely on the basis of its final decision. (b) Both Executive Order 9835 (Part II, Sec. 3) and the regulations (Secs. 395.1 and 396.1) provide for an appeal to and a hearing before the Secretary or his designee before separation from employment; petitioner's request for an appeal to the Secretary, made a few hours after notice of the Loyalty Review Board decision, was denied.

The courts below rested their decision upon the bald assertion that "It was not the intent of Congress that the Secretary of State bind himself to follow the provisions of

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[22] The Government has urged below that the applicable regulations were those of 1951, not 1949. But the 1951 regulations were never published, and petitioner was never advised of their existence until this case reached the District Court. He was supplied a copy of the 1949 regulations, and the charges and opinions were based on those regulations. Quite obviously the secret 1951 regulations cannot validly be applied to this case. But even if they were, petitioner's removal is in violation of the 1951 regulations: (a) Sec. 391.3 makes the regulations applicable to action under the McCarran rider. (b) Sec. 393.1 provides that decisions by the Secretary as well as the Loyalty Security Board "shall be reached after consideration of the complete file, arguments, briefs and testimony presented." Quite obviously this requirement is not met by reading an unlawful opinion of the Loyalty Review Board. (c) Sections 396.11 and 396.12 allow an appeal to the Secretary from a decision requiring removal from employment, which right was denied petitioner.

Executive Order 9835 in dismissing employees under Public Law 188" (R. 88, 98; *infra*, p. 71).

The assertion is wholly unsupported and is contradicted by compelling evidence to the contrary. The State Department in the Spring of 1950 submitted to the Tydings Committee a comprehensive report on its procedures. This report is reproduced *in extenso* in the report of the Tydings Committee (S. Rept. 2108, 81st Cong., 2d Sess. pp. 14-18); the Committee in this respect said that it was "fully satisfied" with the departmental procedures (pp. 18, 23). The State Department report specifically stated (pp. 15, 16):

> After enactment of the McCarran rider the Department did not contemplate that the legislation required or that the people of this country would countenance the use of "Gestapo" methods of harassment or persecution of loyal employees who were American citizens on flimsy evidence or hearsay and innuendo * * * Accordingly, effective during the 1947 fiscal year, and each fiscal year thereafter, the Department considered the McCarran Rider as an additional standard for dealing with security problems in the Department * * * In [its] considered view the McCarran Rider was subject to procedural limitation. The McCarran Rider was not interpreted as permitting reckless discharge or the exercise of arbitrary whims * * * The unique powers conferred on the Department as a result of continuous reenactment of the McCarran Rider led the Department to promulgate regulations which would encompass its duties and powers both under the Executive Order and under the McCarran rider.

The Report of the Tydings Committee received somewhat more than the usual attention from the members of the Congress. The McCarran Rider was nevertheless reenacted without change. 64 Stat. 768; 65 Stat. 575. The assertion

of the courts below is, moreover, contradicted by the Act of August 26, 1950 (64 Stat. 476, 5 U.S.C. Sec. 22-1 *et seq.*) which replaced the McCarran Riders and provided procedures closely corresponding with those of Executive Order 9835. See *Cole* v. *Young*, 351 U. S. 530.

Quite apart from the extraordinary speculation of the courts below as to the Congressional intent, the decision below must be either (a) that the Department regulations, offering minimal procedural safeguards in proceedings under the McCarran Rider, were somehow invalid, or (b) that the Secretary, having been granted summary powers, was wholly free to disregard his regulations. The decision is in either case in conflict with the decisions of this Court and of other courts of appeals.

If a Government official or agency lawfully prescribes rules of procedure, they are binding on the Government as well as the citizen. The Secretary of State promulgated regulations which promised (a) that a case was closed upon approval by the Deputy Under Secretary of favorable decisions; and (b) that there could be appeal to and hearing before the Secretary before action upon an unfavorable decision. Having done so, he was bound by those regulations and could not lawfully ignore them, even though his substantive decision lay within his discretionary authority. *Bridges* v. *Wixon*, 326 U. S. 135, 153; *Chapman* v. *Sheridan-Wyoming Co.*, 338 U. S. 621, 629; *Bilokumsky* v. *Tod*, 263 U. S. 149, 155. "As long as the regulations remain operative," the Secretary "denies himself the right to sidestep the Board," *Accardi* v. *Shaughnessy*, 347 U. S. 260, 267, to intervene to reopen and reverse a case which under his regulations is closed, or summarily to discharge an employee who by his regulations is entitled to an appeal.

The Second Circuit requires that the discretionary power to suspend deportation be exercised in accord both with the procedural regulations, *United States ex rel Weddeke* v.

Watkins, 166 F. 2d 369, 371, cert. den., 333 U. S. 876, and with the established practice, *United States* v. *McGrath*, 181 F. 2d 839, 841, dismissed as moot, 340 U. S. 940. The Sixth Circuit has invalidated a war surplus sale contract provision which forbade resale, contrary to the governing regulation, which "binds the administrator himself equally with others." *School District 2 Fractional* v. *United States*, 229 F. 2d 681, 685.[23] The decision below cannot be reconciled with this settled and salutary doctrine.

Conclusion

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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September 1956.

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[23] Other cases in the courts of appeals which enforce the alien's right to procedural protection held out by the regulations governing discretionary action are *United States* v. *Perkins*, 79 F. 2d 533 (C.C.A. 2); *Sibray* v. *United States*, 282 Fed. 795 (C.C.A. 3); *Mah Shee* v. *White*, 242 Fed. 868 (C.C.A. 9). Others which forbid the agency even in discretionary action to depart from its usual practice are *N. L. R. B.* v. *Mall Tool Co.*, 119 F. 2d 700, 702 (C.C.A. 7); *Berchem* v. *R. F. C.*, 191 F. 2d 922 (Em. Ct. App.).

APPENDIX

APPENDIX A

Fifth Amendment to the Constitution of the United States:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The "McCarran Rider" to Appropriation Acts of the U. S. Department of State (60 Stat. 458, 61 Stat. 288, 62 Stat. 315, 63 Stat. 456, 64 Stat. 768):

> Notwithstanding the provisions of section 6 of the Act of August 24, 1912 (37 Stat. 555), or the provisions of any other law, the Secretary of State may, in his absolute discretion, during the current fiscal year, terminate the employment of any officer or employee of the Department of State or of the Foreign Service of the United States whenever he shall deem such termination necessary or advisable in the interests of the United States.

Notes: (1) In the first of the cited provisions, for the Fiscal Year 1947, the final period as quoted above was a comma with the following clause added—

> "but such termination shall not affect the right of such officer or employee to seek or accept employment in any other department or agency of the Government if declared eligible for such employment by the United States Civil Service Commission."

(2) In the first three of the cited provisions, in place of the phrase "during the current fiscal year," there appeared the phrase "on or before June 30, [1947, 1948 or 1949]."

Executive Order No. 9835 (12 Fed. Reg. 1935):

PRESCRIBING PROCEDURES FOR THE ADMINISTRATION OF AN EMPLOYEES LOYALTY PROGRAM IN THE EXECUTIVE BRANCH OF THE GOVERNMENT

WHEREAS each employee of the Government of the United States is endowed with a measure of trusteeship over the democratic processes which are the heart and sinew of the United States; and

WHEREAS it is of vital importance that persons employed in the Federal service be of complete and unswerving loyalty to the United States; and

WHEREAS, although the loyalty of by far the overwhelming majority of all Government employees is beyond question, the presence within the Government service of any disloyal or subversive person constitutes a threat to our democratic processes; and

WHEREAS maximum protection must be afforded the United States against infiltration of disloyal persons into the ranks of its employees, and equal protection from unfounded accusations of disloyalty must be afforded the loyal employees of the Government:

NOW, THEREFORE, by virtue of the authority vested in me by the Constitution and statutes of the United States, including the Civil Service Act of 1883 (22 Stat. 403), as amended, and section 9A of the act approved August 2, 1939 (18 U.S.C. 611), and as President and Chief Executive of the United States, it is hereby, in the interest of the internal management of the Government, ordered as follows:

PART I—INVESTIGATION OF APPLICANTS

1. There shall be a loyalty investigation of every person entering the civilian employment of any department or agency of the executive branch of the Federal Government.

a. Investigations of persons entering the competitive service shall be conducted by the Civil Service Commission, except in such cases as are covered by a special agreement between the Commission and any given department or agency.

b. Investigations of persons other than those entering the competitive service shall be conducted by the employing department or agency. Departments and agencies without investigative organizations shall utilize the investigative facilities of the Civil Service Commission.

2. The investigations of persons entering the employ of the executive branch may be conducted after any such person enters upon actual employment therein, but in any such case the appointment of such person shall be conditioned upon a favorable determination with respect to his loyalty.

a. Investigations of persons entering the competitive service shall be conducted as expeditiously as possible; provided, however, that if any such investigation is not completed within 18 months from the date on which a person enters actual employment, the condition that his employment is subject to investigation shall expire, except in a case in which the Civil Service Commission has made an initial adjudication of disloyalty and the case continues to be active by reason of an appeal, and it shall then be the responsibility of the employing department or agency to conclude such investigation and make a final determination concerning the loyalty of such person.

3. An investigation shall be made of all applicants at all available pertinent sources of information and shall include reference to:

a. Federal Bureau of Investigation files.
b. Civil Service Commission files.
c. Military and naval intelligence files.
d. The files of any other appropriate government investigative or intelligence agency.
e. House Committee on un-American files.
f. Local law-enforcement files at the place of residence and employment of the applicant, including municipal, county, and State law-enforcement files.
g. Schools and colleges attended by applicant.
h. Former employers of applicant.
i. References given by applicant.
j. Any other appropriate source.

4. Whenever derogatory information with respect to

loyalty of an applicant is revealed a full field investigation shall be conducted. A full field investigation shall also be conducted of those applicants, or of applicants for particular positions, as may be designated by the head of the employing department or agency, such designations to be based on the determination by any such head of the best interests of national security.

PART II—INVESTIGATION OF EMPLOYEES

1. The head of each department and agency in the executive branch of the Government shall be personally responsible for an effective program to assure that disloyal civilian officers or employees are not retained in employment in his department or agency.

a. He shall be responsible for prescribing and supervising the loyalty determination procedures of his department or agency in accordance with the provisions of this order, which shall be considered as providing minimum requirements.

b. The head of a department or agency which does not have an investigative organization shall utilize the investigative facilities of the Civil Service Commission.

2. The head of each department and agency shall appoint one or more loyalty boards, each composed of not less than three representatives of the department or agency concerned, for the purpose of hearing loyalty cases arising within such department or agency and making recommendations with respect to the removal of any officer or employee of such department or agency on grounds relating to loyalty, and he shall prescribe regulations for the conduct of the proceedings before such boards.

a. An officer or employee who is charged with being disloyal shall have a right to an administrative hearing before a loyalty board in the employing department or agency. He may appear before such board personally accompanied by counsel or representative of his own choosing, and present evidence on his own behalf, through witnesses or by affidavit.

b. The officer or employee shall be served with a written notice of such hearing in sufficient time, and shall be in-

formed therein of the nature of the charges against him in sufficient detail so that he will be enabled to prepare his defense. The charges shall be stated as specifically and completely as in the discretion of the employing department or agency, security considerations permit and the officer or employee shall be informed in the notice (1) of his right to reply to such charges in writing within a specified reasonable period of time, (2) of his right to an administrative hearing on such charges before a loyalty board and (3) of his right to appear before such board personally, to be accompanied by counsel or representative of his own choosing, and to present evidence on his behalf, through witness or by affidavit.

3. A recommendation of removal by a loyalty board shall be subject to appeal by the officer or employee affected, prior to his removal to the head of the employing department or agency or to such person or persons as may be designated by such head under such regulations as may be prescribed by him, and the decisions of the department or agency concerned shall be subject to appeal to the Civil Service Commission's Loyalty Review Board, hereinafter provided for, for an advisory recommendation.

4. The rights of hearing, notice thereof, and appeal therefrom shall be accorded to every officer or employee prior to his removal on grounds of disloyalty, irrespective of tenure, or of manner, method, or nature of appointment but the head of the employing department or agency may suspend any officer or employee at any time pending a determination with respect to loyalty.

5. The loyalty boards of the various departments and agencies shall furnish to the Loyalty Review Board, hereinafter provided for, such reports as may be requested concerning the operation of the loyalty program in any such department or agency.

PART III—RESPONSIBILITIES OF CIVIL SERVICE COMMISSION

1. There shall be established in the Civil Service Commission a Loyalty Review Board of not less than three impartial persons, the members of which shall be officers or employees of the Commission.

a. The Board shall have authority to review cases involving persons recommended for dismissal on grounds relating to loyalty by the loyalty board of any department or agency and to make advisory recommendations thereon to the head of the employing department or agency. Such cases may be referred to the Board either by the employing department or agency, or by the officer or employee concerned.

b. The Board shall make rules and regulations not inconsistent with the provisions of this order, deemed necessary to implement statutes and Executive orders relating to employee loyalty.

c. The Loyalty Review Board shall also:

(1) Advise all departments and agencies on all problems relating to employee loyalty.

(2) Disseminate information pertinent to employee loyalty programs.

(3) Coordinate the employee loyalty policies and procedures of the several departments and agencies.

(4) Make reports and submit recommendations to the Civil Service Commission for transmission to the President from time to time as may be necessary to the maintenance of the employee loyalty program.

2. There shall also be established and maintained in the Civil Service Commission a central master index covering all persons on whom loyalty investigations have been made by any department or agency since September 1, 1939. Such master index shall contain the name of each person investigated, adequate identifying information concerning each such person, and a reference to each department and agency which has conducted a loyalty investigation concerning the person involved.

a. All executive departments and agencies are directed to furnish to the Civil Service Commission all information appropriate for the establishment and maintenance of the central master index.

b. The reports and other investigative material and information developed by the investigating department or agency shall be retained by such department or agency in each case.

3. The Loyalty Review Board shall currently be furnished by the Department of Justice the name of each foreign or domestic organization, association, movement, group or combination of persons which the Attorney General, after appropriate investigation and determination, designates as totalitarian, fascist, communist or subversive, or as having adopted a policy of advocating or approving the commission of acts of force or violence to deny others their rights under the Constitution of the United States, or as seeking to alter the form of government of the United States by unconstitutional means.

a. The Loyalty Review Board shall disseminate such information to all departments and agencies.

PART IV—SECURITY MEASURES IN INVESTIGATIONS

1. At the request of the head of any department or agency of the executive branch an investigative agency shall make available to such head, personally, all investigative material and information collected by the investigative agency concerning any employee or prospective employee of the requesting department or agency, or shall make such material and information available to any officer or officers designated by such head and approved by the investigative agency.

2. Notwithstanding the foregoing requirement however, the investigative agency may refuse to disclose the names of confidential informants, provided it furnishes sufficient information about such informants on the basis of which the requesting department or agency can make an adequate evaluation of the information furnished by them and provided it advises the requesting department or agency in writing that it is essential to the protection of the informants or to the investigation of other cases that the identity of the informants not be revealed. Investigative agencies shall not use this discretion to decline to reveal sources of information where such action is not essential.

3. Each department and agency of the executive branch should develop and maintain, for the collection and analysis of information relating to the loyalty of its employees and prospective employees, a staff specially trained in security

techniques, and an effective security control system for protecting such information generally and for protecting confidential sources of such information particularly.

Part V—Standards

1. The standard for the refusal of employment or the removal from employment in an executive department or agency on grounds relating to loyalty shall be that, on all the evidence, reasonable grounds exist for belief that the person involved is disloyal to the Government of the United States.

2. Activities and associations of an applicant or employee which may be considered in connection with the determination of disloyalty may include one or more of the following:

a. Sabotage, espionage, or attempts or preparations therefor, or knowingly associating with spies or saboteurs;

b. Treason or sedition or advocacy thereof;

c. Advocacy of revolution or force or violence to alter the constitutional form of government of the United States;

d. Intentional, unauthorized disclosure to any person, under circumstances which may indicate disloyalty to the United States, of documents or information of a confidential or non-public character obtained by the person making the disclosure as a result of his employment by the Government of the United States;

e. Performing or attempting to perform his duties, or otherwise acting, so as to serve the interests of another government in preference to the interests of the United States.

f. Membership in, affiliation with or sympathetic association with any foreign or domestic oganization, association, movement, group or combination of persons, designated by the Attorney General as totalitarian, fascist, communist, or subversive, or as having adopted a policy of advocating or approving the commission of acts of force or violence to deny other persons their rights under the Constitution of the United States, or as seeking to alter the form of government of the United States by unconstitutional means.

Part VI—Miscellaneous

1. Each department and agency of the executive branch, to the extent that it has not already done so, shall submit, to the Federal Bureau of Investigation of the Department of Justice, either directly or through the Civil Service Commission, the names (and such other necessary identifying material as the Federal Bureau of Investigation may require) of all of its incumbent employees.

a. The Federal Bureau of Investigation shall check such names against its records of persons concerning whom there is substantial evidence of being within the purview of paragraph 2 of Part V hereof, and shall notify each department and agency of such information.

b. Upon receipt of the above-mentioned information from the Federal Bureau of Investigation, each department and agency shall make, or cause to be made by the Civil Service Commission, such investigation of those employees as the head of the department or agency shall deem advisable.

2. The Security Advisory Board of the State-War-Navy Coordinating Committee shall draft rules applicable to the handling and transmission of confidential documents and other documents and information which should not be publicly disclosed, and upon approval by the President such rules shall constitute the minimum standards for the handling and transmission of such documents and information, and shall be applicable to all departments and agencies of the executive branch.

3. The provisions of this order shall not be applicable to persons summarily removed under the provisions of section 3 of the act of December 17, 1942, 56 Stat. 1053, of the act of July 5, 1946, 60 Stat. 453, or of any other statute conferring the power of summary removal.

4. The Secretary of War and the Secretary of the Navy, and the Secretary of the Treasury with respect to the Coast Guard, are hereby directed to continue to enforce and maintain the highest standards of loyalty within the armed services, pursuant to the applicable statutes, the Articles of War, and the Articles for the Government of the Navy.

5. This order shall be effective immediately, but compliance with such of its provisions as require the expenditure

of funds shall be deferred pending the appropriation of such funds.

6. Executive Order No. 9300 of February 5, 1943, is hereby revoked.

HARRY S. TRUMAN.

The White House
March 21, 1947.

Executive Order No. 10241 (16 Fed. Reg. 3690):

AMENDING EXECUTIVE ORDER NO. 9835 ENTITLED "PRESCRIBING PROCEDURES FOR THE ADMINISTRATION OF AN EMPLOYEES LOYALTY PROGRAM IN THE EXECUTIVE BRANCH OF THE GOVERNMENT"

By virtue of the authority vested in me by the Constitution and statutes of the United States, including the Civil Service Act of 1883 (22 Stat. 403) as amended, and section 9A of the act approved August 2, 1939 (5 U.S.C. 118), and as President of the United States, it is ordered that paragraph 1 of Part V of Executive Order No. 9835 of March 21, 1947, entitled "Prescribing Procedures for the Administration of an Employees Loyalty Program in the Executive Branch of the Government", be, and it is hereby, amended to read as follows:

"1. The standard for the refusal of employment or the removal from employment in an executive department or agency on grounds relating to loyalty shall be that, on all the evidence, there is a reasonable doubt as to the loyalty of the person involved to the Government of the United States."

HARRY S. TRUMAN.

The White House,
April 28, 1951.

Regulations and Procedures relating to Loyalty and Security of Employees, U. S. Department of State, as adopted March 11, 1949:

391 *Authority and General Policy*

391.1 The Department of State, because of its responsibility for the conduct of foreign affairs, is a vital target for persons engaged in espionage or subversion of the United States Government. Owing to this fact and because of the great number of highly classified communications which pass through the Department, the security of which is essential to the maintenance of peaceful and friendly international relations, it is highly important to the interests of the United States that no person be employed in the Department who is disloyal or who constitutes a security risk.

391.2 The necessity for removing disloyal employees from the Federal service and for refusing employment therein to disloyal persons, and the obligation to protect employees and applicants from unfounded accusations of disloyalty, have been recognized in Executive Order 9835 which establishes the President's Loyalty Program. The regulations and directives duly promulgated by and under the authority of the Loyalty Review Board of the Civil Service Commission (hereinafter referred to as the Loyalty Review Board), in accordance with the provisions of Executive Order 9835, as set forth in Title 5, Chapter II, of the Code of Federal Regulations (13 F. R. 253), constitute the basic and controlling regulations to govern all loyalty adjudication procedures in the Department of State. So far as it relates to the handling of loyalty cases, the statement of procedure below is promulgated in accordance therewith.

391.3 In addition, the Secretary of State has been granted by Congress the right, in his absolute discretion, to terminate the employment of any officer or employee of the Department of State or of the Foreign Service of the United States whenever he shall deem such termination necessary or advisable in the interests of the United States. In the exercise of this right, the Department will, so far as possible, afford its employees the same protection as those provided under the Loyalty Program.

392 *Loyalty Standard*

Part V of Executive Order 9835 provides as follows:

1. The standard for the refusal of employment or the removal from employment in an executive department or agency on grounds relating to loyalty shall be that, on all the evidence, reasonable grounds exist for belief that the person involved is disloyal to the Government of the United States.

2. Activities and associations of an applicant or employee which may be considered in connection with the determination of disloyalty may include one or more of the following:

a. Sabotage, espionage, or attempts or preparations therefor, or knowingly associating with spies or saboteurs;

b. Treason or sedition or advocacy thereof;

c. Advocacy of revolution or force or violence to alter the constitutional form of Government of the United States;

d. Intentional, unauthorized disclosure to any person, under circumstances which may indicate disloyalty to the United States, of documents or information of a confidential or non-public character obtained by the person making the disclosure as a result of his employment by the Government of the United States;

e. Performing or attempting to perform his duties, or otherwise acting, so as to serve the interests of another government in preference to the interests of the United States;

f. Membership in, affiliation with or sympathetic association with any foreign or domestic organization, association, movement, group or combination of persons, designated by the Attorney General as totalitarian, fascist, communist, or subversive, or as having adopted a policy of advocating or approving the commission of acts of force or violence to deny other persons their rights under the Constitution of the United States or as seeking to alter the form of

Government of the United States by unconstitutional means.

393 *Security Principles of the Department of State*

393.1 *Categories Constituting Security Risks*

As used herein, an officer or employee constitutes a security risk when he falls into one or more of the following categories:

a. A person who engages in, supports, or advocates treason, subversion, or sedition, or who is a member of, affiliated with, or in sympathetic association with the Communist, Nazi, or Fascist Parties, or of any foreign or domestic party or movement which seeks to alter the form of government of the United States by unconstitutional means or whose policy is to advocate or approve the commission of acts of force or violence to deny other persons their rights under the Constitution of the United States; or a person who consistently believes in or supports the ideologies and policies of such a party or movement.

b. A person who is engaged in espionage or who is acting directly or indirectly under the instructions of any foreign government; or who deliberately performs his duties, or otherwise acts to serve the interests of another government in preference to the interest of the United States.

c. A person who has knowingly divulged classified information without authority and with the knowledge or belief or with reasonable grounds for the knowledge or belief that it will be transmitted to agencies of a foreign government, or who is so consistently irresponsible in the handling of classified information as to compel the conclusion of extreme lack of care or judgment.

d. A person who has habitual or close association with persons known or believed to be in categories a or b to an extent which would justify the conclusion that he might, through such association, voluntarily

or involuntarily divulge classified information without authority.

393.2 *Determining a Security Risk*

In determining whether or not a person is a security risk, the following factors, among others, will be taken into account, together with such mitigating circumstances as may exist:

a. Participation in one or more of the parties or movements referred to above, or in organizations which are fronts for, or are controlled by, any such party or movement, either by membership therein, taking part in its executive direction or control, contribution of funds thereto, attendance at meetings, employment thereby, registration to vote as a member of such a party, or signature of petition to elect a member of such a party to public office or to accomplish any other purpose supported by such a party; or by written evidences or oral expressions by speeches or otherwise, or political, economic, or social views.

b. Service in the governments or armed forces of enemy countries, or other voluntary activities in support of foreign governments.

c. Violation of security regulations.

d. Voluntary association with persons known or believed to be [illegible] categories a or b of sec. 393.1.

393.3 *Considerations in Weighing Evidence*

393.31 A former course of conduct or holding of beliefs will be presumed to continue in the absence of positive evidence indicating a change, both in course of action and conviction, by clear, overt, and unequivocal acts.

393.32 If a reasonable doubt exists as to whether the person falls into one of the categories listed in sec. 393.1, the Department will be given the benefit of the doubt, and the person will be deemed a security risk.

394 *Prehearing Procedures of the Loyal and Security Board*

394.1 *Loyalty Cases*

394.11 All cases in which a report of a loyalty investigation is received shall be referred for consideration to the LSB which shall take action on every case so referred. The LSB shall examine the report of investigation and may request further investigation if such action appears to be necessary. Whenever practicable, such request shall be specific as to the additional information required.

394.12 The LSB shall consider the report of investigation in the light of the loyalty standard as set forth in sec. 392 and shall determine whether such report warrants a finding clearly favorable to the individual or appears to call for further processing of the case with a view to possible removal action. If the LSB reaches a clearly favorable conclusion, it shall so determine and recommend to the Assistant Secretary—Administration that favorable action be taken. If the LSB determines that such report does not warrant a finding clearly favorable to the individual, the procedures set forth in secs. 394.13, 394.14, 394.15, 394.16 shall be followed.

394.13 In all cases in which the evidence indicates that removal action may be warranted, the LSB shall serve the officer or employee with a notice in writing which shall state the nature of the charges against him in factual detail, setting forth in particular the facts and circumstances relating to the charges so far as security considerations will permit, in order to enable the employee to submit his answer, defense, or explanation.

394.14 The officer or employee shall be informed of his right to answer the charges in writing, under oath or affirmation, within a reasonable period of time, not less than 10 calendar days from the date of receipt by the employee of the notice; of his right to have an administrative hearing on the charges before the LSB not less than 15 calendar days before such hearing is

to take place; and of his right to appear before the LSB personally, to be represented by counsel or representative of his own choosing, and to present evidence in his own behalf.

394.15 The notice shall be given to the employee at least 30 calendar days in advance of the effective date of the proposed removal action, except as provided in the Federal Personnel Manual. It shall state the work and pay status in which he will be carried during the notice and until the determination of the LSB, and the authority or authorities (Executive order and statute, if appliable) under which the notice is sent.

394.16 After giving the employee the foregoing notice, the LSB shall proceed as follows:

a. If the incumbent or excepted employee does not reply to the notice within the time specified by the LSB, the LSB shall consider the case on the complete file and recommened action to the Assistant Secretary—Administration.

b. If the incumbent or excepted employee answers the charges in writing but does not request a hearing, the LSB shall then consider the case on the complete file (including such answer) and recommend action to the Assistant Secretary—Administration.

c. If the incumbent or excepted employee requests a hearing before the LSB, a time and place for such hearing shall be set by the LSB, as convenient to the employee as circumstances permit and within the times specified in the notice of hearing referred to in secs. 394.13, 394.14 and 394.15 above, and he shall be allowed a reasonable time to assemble his witnesses and prepare his defense. This hearing shall be conducted in accordance with the provisions of sec. 395.

394.2 *Security Cases*

394.21 The LSB shall take action in the cases of all officers and employees which are referred to it by the responsible authorities of the Department.

394.22 The LSB shall make a determination in such cases that the officer or employee concerned shall be given the right of a hearing to determine whether his continued employment constitutes a security risk to the Department or whether, on the basis of the record presented, the continued employment of the officer or employee does not constitute a security risk to the Department.

394.23 If the LSB determines that the officer or employee should be given the right of a hearing, the procedures set forth in secs. 394.13-394.16 and 395, shall be followed.

395 *Hearing Procedure of the Loyalty and Security Board*

395.1 *Statement of Charges and Right to Hearing and Appeal*

As indicated in sec. 394, before any officer or employee of the Department of State or of the Foreign Service of the United States is removed from employment for disloyalty or as a security risk, he shall be provided with a statement of the charges against him, and be granted the right to a hearing before the LSB and an appeal to the Secretary of State, or his designee or designees. If he is charged with disloyalty, he may appeal to the Loyalty Review Board for a determination as to his loyalty. An officer or employee may, however, be suspended at any time in the interests of national security pending a determination with respect to loyalty or security risk.

395.2 *Evidence*

The Department and employee may introduce such evidence as the LSB may deem proper.

395.3 *Hearings*

395.31. The hearing shall be private and shall be attended only by the members of the LSB, other appropriate Government officials connected with the adjudi-

cation process, the officer or employee, his counsel or representative, and the witness who is testifying.

395.32 The Chairman of the LSB shall preside; the officer or employee shall be permitted to appear personally, and either by himself or by his representative or counsel to present evidence in his own behalf, through witness or by affidavit.

395.33 Testimony shall be given under oath or affirmation. Members of the LSB may ask such questions of him and his witnesses as they may desire.

395.34 A stenotypist record will be made of the proceedings by a person or persons designated by the LSB and no other transcript shall be made. A copy of the transcript will be provided to the officer or employee upon request.

395.35 Strict legal rules of evidence will not be applied at such hearing, but reasonable bounds shall be maintained as to competency, relevancy, and materiality.

395.4 *Consideration of Decision*

395.41 After the record of the hearing has been reduced to writing, the LSB will convene in executive session to reach a decision.

395.42 In its consideration, the LSB shall be governed by the loyalty standard provided in sec. 392 or the security principles provided in sec. 393, depending upon the nature of the case and the evidence submitted. After examination of the evidence and following any desired discussion, the vote shall be by ballot and the decision by majority vote. The vote by each member shall be recorded.

395.43. In arriving at its decision, the LSB shall take into consideration the fact that the employee may have been handicapped in his defense by the non-disclosure to him of confidential information or by the lack of opportunity to cross-examine persons constituting such sources of information.

395.5 *Decision*

395.51 The decision of the LSB shall be one of the following:

a. The LSB recommends that, on the evidence submitted, the officer or employee should not be separated from employment under the loyalty standard referred to in sec. 392, or as a security risk under the security principles provided in sec. 393, and further recommends either that the case be closed or that further investigation be made along specific lines, with or without suspension; or

b. The LSB recommends that the officer or employee be separated from employment for disloyalty under the loyalty standard referred to in sec. 392 and as a security risk under the security principles provided in sec. 393; or

c. The LSB recommends that the officer or employee be separated from employment as a security risk under the security principles provided in sec. 393.

395.52 If the recommendation of the LSB is for separation from employment, it may, depending upon the nature of the case, the evidence presented, or consideration of mitigating circumstances, suggest that the officer or employee be dismissed or that, upon his request, he be permitted to resign.

395.53 The decision of the LSB shall be made in writing and shall be signed by the members of the LSB. It shall state the action taken and shall be made a permanent part of the record. The record shall be classified as secret and transmitted to the Assistant Secretary—Administration.

395.6 *Action by Assistant Secretary—Administration*

Upon receipt of the record including the decision of the LSB, the Assistant Secretary—Administration shall take whatever action he deems appropriate with respect thereto and may, if the situation warrants,

suspend the officer or employee pending further investigation or any appeal which may be made. If the decision of the LSB is favorable to the officer or employee concerned and is concurred in by the Assistant Secretary—Administration, he will so notify the officer or employee.

396 *Appeals*

396.1 *Notification of Separation and Right of Appeal*

396.11 If the decision is for separation from employment for disloyalty and as a security risk, or only as a security risk, the officer or employee shall be so notified by the Assistant Secretary—Administration and advised in writing of his right to appeal to the Secretary of State, or his designee or designees, within 10 calendar days after receipt of such notification. In those cases where separation from employment is contemplated only on the grounds of a security risk, the notice will state that the officer or employee is not considered disloyal by the Department.

396.12 Upon the exercise by the officer or employee of such right of appeal, the Secretary, or his designee or designees, will afford the officer or employee a hearing on the record at a date not earlier than one week after receipt by the Secretary of written notice of appeal. This hearing shall be private and shall be attended only by the Secretary, and/or his designee or designees, the officer or employee, and a single counsel or representative of his own choosing. The officer or employee shall be permitted to appear personally, and either by himself or his counsel or representative, to present a statement or brief in his own behalf. No witnesses will be heard by the Secretary, or his designee or designees, nor will any new evidence be considered which is not contained in the record or submitted at that hearing as the statement or brief of the officer or employee concerned. A stenotypist record will be made of the proceedings and a copy of the transcript will be provided to the officer or employee upon request.

396.2 *Decision Against Removal*

396.21 If, as a result of such hearing, the Secretary of State decides that there is insufficient evidence to support removal under the loyalty standard referred to in sec. 392, and under the security principles referred to in sec. 393, he may direct that the case be closed, that further investigation be conducted, or that the officer or employee be dismissed or permitted to resign as a security risk.

396.22 If the Secretary of State decides that there is insufficient evidence to support removal under the security principles referred to in sec. 393, he may direct that the case be closed or that further investigation be conducted.

396.23 If the decision of the Secretary of State is favorable to the officer or employee, he shall be so notified in writing.

396.3 *Decision for Separation from Employment*

396.31 If, as a result of such hearing, the Secretary of State decides that the officer or employee should be separated from employment, the officer or employee will be so notified in writing. In such event the Secretary of State may, in addition, direct his suspension if he is not already suspended or may permit him to resign.

396.32 If the decision is that the officer or employee should be separated from employment for disloyalty and as a security risk, such notice shall state that, so far as the loyalty determination is concerned, the officer or employee has a right to appeal in writing to the Loyalty Review Board within 20 days after the receipt of the notice in the case of persons living within the continental United States and within 30 days in cases of persons living outside the continental limits of the United States.

396.33 In the event that the officer or employee submits an appeal to the Loyalty Review Board, he shall forthwith give notice thereof to the Secretary of State.

396.4 *Advisory Recommendation by the Loyalty Review Board*

If, after consideration of a case, the Loyalty Review Board makes an advisory recommendation to the Secretary of State that the officer or employee should be removed from employment under the loyalty standard referred to in sec. 392, the Department will take prompt adminisfrative action to remove him from employment.

396.5 *Action on Findings of the Loyalty Review Board*

396.51 If, after hearing an appeal from a decision that an officer or employee should be separated from employment for disloyalty and as a security risk, the Loyalty Review Board makes a finding that reasonable grounds do not exist for the belief that the officer or employee is disloyal, the Secretary of State or his designee, may:

a. Restore the officer or employee to duty, if suspended, and close the case; or

b. Permit the officer or employee to resign from the Department; or

c. Terminate the employment of the officer or employee under the authority conferred by Title I of the Appropriations Act of 1948 (McCarran Rider) or other appropriate authority.

396.52 Prior to final action, the Secretary of State, or his designee, may refer the case to the LSB and obtain a recommendation whether the officer or employee should be separated from employment as a security risk.

396.6 *Cases Involving Separations Not Subject to Review by the Civil Service Commission*

In the event of a decision that an officer or employee should be separated from employment only as a security risk and the case does not fall within the category of cases subject to review by the Civil Service Commission, the Secretary of State will normally permit the

officer or employee to resign from the Department in lieu of terminating his employment. This policy is adopted since no forum will exist outside the Department in which the officer or employee may affirmatively establish his loyalty.

396.7 *Decision that Employee is Loyal and Not a Security Risk*

If the Assistant Secretary—Administration or the Secretary of State shall, during his consideration of any case, decide affirmatively that an officer or employee is not disloyal and does not constitute a security risk and that his case should be closed, such officer or employee shall be restored to duty, if suspended, and the record shall show such decision.

Regulations and Procedures relating to Loyalty and Security of Employees, U. S. Department of State, as adopted May 4, 1951, and revised September 21, 1951:

391 *General*

391.1 *Policy*

The Department of State, because of its responsibility for the conduct of foreign affairs, is a vital target for persons engaged in espionage or subversion of the United States Government. Owing to this fact and because of the great number of highly classified communications which pass through the Department, the security of which is essential to the maintenance of peaceful and friendly international relations, it is highly important to the interests of the United States that no person be employed in the Department who is disloyal or who constitutes a security risk. As used in these regulations, the term "Department of State" shall be construed to include the Foreign Service of the United States.

391.2 *Loyalty Authority*

On March 21, 1947, the President issued Executive Order 9835 to assure: (a) "that persons employed in

the Federal service be of complete and unswerving loyalty to the United States"; (b) that the United States afford "maximum protection against infiltration of disloyal persons into the ranks of its employees"; and, at the same time, that (c) there be given equal protection to the loyal employees of the United States "from unfounded accusations of disloyalty." The regulations and directives duly promulgated by and under the authority of the Loyalty Review Board of the Civil Service Commission (hereinafter referred to as the Loyalty Review Board), in accordance with the provisions of Executive Order 9835, as set forth in title 5, chapter II, of the Code of Federal Regulations (13 F.R. 253), constitute the basic and controlling regulations to govern all loyalty adjudication procedures in the Department of State (including the Foreign Service of the United States). So far as it relates to the handling of loyalty cases, the statement of procedures below is promulgated in accordance therewith.

391.3 *Security Authority*

The Secretary of State has been granted by Congress (Public Law 733, 81st Congress; General Appropriations Act, 1951, Section 1213, Public Law 759, 81st Congress) the right in his absolute discretion to terminate the employment of any officer or employee of the Department of State (including the Foreign Service of the United States) or to suspend the employment of any such officer or employee and, following such investigation and review as he deems necessary, to terminate the employment of the officer or employee whenever he shall determine such termination necessary or advisable in the interest of the national security of the United States, and such determination by the Secretary of State is conclusive and final. So far as it relates to the handling of security cases, the statement of procedures below is promulgated under the authority of these laws.

391.4 *Loyalty Security Board*

The Loyalty Security Board of the Department of State consists of at least three members, appointed by the Secretary of State. One of the members is designated by the Secretary as chairman. Any three members constitute a quorum for the transaction of business. The board considers and acts on all cases involving incumbent and excepted officers and employees of the Department of State and the Foreign Service of the United States, and all cases involving applicants for excepted positions in the Department and the Foreign Service in which a report of loyalty investigation is made by the Federal Bureau of Investigation, and all cases of officers and employees of the Department and the Foreign Service in which a report of security investigation is made and referred to the board by the responsible authorities of the Department. The board may operate through panels consisting of not less than three members of the board designated by the chairman, who shall also designate the chairman of each panel. The actions taken by panels shall be the actions of the Board.

392 *Loyalty Standard*

392.1 The standard for the refusal of employment or the removal from employment in the Department of State under Executive Order 9835 on grounds relating to loyalty shall be that, on all the evidence, reasonable grounds exist for belief that the person involved is disloyal to the Government of the United States. The decision shall be reached after consideration of the complete file, arguments, briefs and testimony presented.

392.2 Activities and associations of an applicant or employee which may be considered in connection with the determination of disloyalty may include one or more of the following:

a. Sabotage, espionage, or attempts or preparations therefor, or knowingly associating with spies or saboteurs.

b. Treason or sedition or advocacy thereof.

c. Advocacy of revolution or force or violence to alter the constitutional form of Government of the United States.

d. Intentional, unauthorized disclosure to any person, under circumstances which may indicate disloyalty to the United States, of documents or information of a confidential or nonpublic character obtained by the person making the disclosure as a result of his employment by the Government of the United States.

e. Performing or attempting to perform his duties, or otherwise acting, so as to serve the interests of another government in preference to the interests of the United States.

f. Membership in, affiliation with, or sympathetic association with any foreign or domestic organization, association, movement, group or combination of persons, designated by the Attorney General as totalitarian, fascist, communist, or subversive, or as having adopted a policy of advocating or approving the commission of acts of force or violence to deny other persons their rights under the Constitution of the United States or as seeking to alter the form of Government of the United States by unconstitutional means.

392.3 Section 9A of the Hatch Act makes it unlawful for any employee of the Federal Government to have membership in any political party or organization which advocates the overthrow of our constitutional form of Government in the United States. The current appropriation act forbids the payment of salary or wages to any person who advocates, or who is a member of an organization that advocates, the overthrow of the Government of the United States by force or violence. Present membership in any of the organizations designated by the Attorney General as being within the scope of section 9A of the Hatch Act or as seeking to alter the form of Government of the United States

by force or violence, for the purpose of adjudicating cases under Executive Order 9835, is considered as bringing the case within the purview of Section 9A of the Hatch Act and the applicable appropriation act. If, in the consideration of a case, the Loyalty Security Board finds as a fact that the individual is a member of such an organization or that he advocates the overthrow of the Government of the United States by force or violence, removal from or refusal of employment is mandatory.

393 *Security Standards and Principles*

393.1 *Security Standard*

The standard for removal from employment in the Department of State under the authority referred to in section 391.3 shall be that on all the evidence reasonable grounds exist for belief that the removal of the officer or employee involved is necessary or advisable in the interest of national security. The decision shall be reached after consideration of the complete file, arguments, briefs, and testimony presented.

393.2 *Categories Constituting Security Risks*

Reasonable grounds shall be deemed to exist for belief that the removal of an officer or employee is necessary or advisable in the interest of national security when he falls into one or more of the following categories:

a. A person who engages in, supports, or advocates treason, subversion, or sedition, or who is a member of, affiliated with, or in sympathetic association with the Communist, Nazi, or Fascist Parties, or of any foreign or domestic party or movement which seeks to alter the form of government of the United States by unconstitutional means or whose policy is to advocate or approve the commission of acts of force or violence to deny other persons their rights under the Constitution of the United States; or a person who consistently believes in or supports the ideologies and policies of such a party or movement.

b. A person who is engaged in espionage or who is acting directly or indirectly under the instructions of any foreign government; or who deliberately performs his duties, or otherwise acts to serve the interests of another government in preference to the interest of the United States.

c. A person who has knowingly divulged classified information without authority and with the knowledge or belief or with reasonable grounds for the knowledge or belief that it will be transmitted to agencies of a foreign government, or who is so consistently irresponsible in the handling of classified information as to justify the conclusion of extreme lack of care or judgment.

d. A person who has habitual or close association with persons known or believed to be in categories a or b to an extent which would justify the conclusion that he might, through such association, voluntarily or involuntarily divulge classified information without authority.

e. A person who is of such habits or weakness of character as to justify the conclusion that he might lack discretion or good judgment in the handling of classified material and information.

393.3 *Determining a Security Risk*

In determining whether or not an officer's or employee's removal is deemed necessary or advisable in the interest of national security, the following factors, among others, will be taken into account, together with such mitigating circumstances as may exist:

a. Participation in one or more of the parties or movements referred to in section 393.2a, or in organizations which are fronts for, or are controlled by, any such party or movement, either by membership therein, taking part in its executive direction or control, contribution of funds thereto, attendance at meetings, employment thereby, registration to vote as a member of such a party, or signature of petition to elect a member of such a party to public office or

to accomplish any other purpose supported by such a party; or by written evidences or oral expressions by speeches or otherwise, or political, economic, or social views. While an organization appearing on the Attorney General's list as a totalitarian, Fascist, Communist, or subversive organization is conclusively presumed to be within the purview of 393.2a, consideration will also be given to a person's membership in, affiliation with, or sympathetic association with any other organization, party, or movement which has been cited as subversive, Communist, Fascist, etc., by a government agency, committee, or other authoritative source.

b. Service in the governments or armed forces of enemy countries or other voluntary activities in support of foreign governments.

c. Violations of security regulations.

d. Voluntary association with persons known or believed to be in categories a or b of section 393.2.

e. Habitual drunkenness, moral turpitude, irresponsibility, etc.

393.4 *Considerations in Weighing Evidence*

393.41 A former course of conduct or holding of beliefs shall be presumed to continue in the absence of positive evidence indicating a change, both in course of action and conviction, by clear, overt, and unequivocal acts.

393.42 If a reasonable doubt exists as to whether the person falls into one of the categories listed in section 393.2, the Department shall be given the benefit of the doubt, and the person shall be deemed to fall into such category.

394 *Initial Consideration and Action by the Loyalty Security Board*

394.1 *Cases Involving Loyalty and Security*

394.11 All cases in which a report of a loyalty investigation by the Federal Bureau of Investigation is re-

ceived shall be referred for consideration to the Loyalty Security Board which shall take action on every case so referred. The board shall examine each report of loyalty investigation in the light of the loyalty standard set forth in section 392 and the security standard and principles set forth in section 393. After examination of the report of investigation the board may:

a. Request further investigation if such action appears to be necessary, any such request being made as specific as possible as to the additional information required; or

b. If deemed necessary or advisable to obtain information or clarification of certain matters from the officer or employee prior to reaching a conclusion as to whether the case should be closed favorably, whether charges should be made, or further investigation should be requested, give the officer or employee an opportunity, if he so desires, to answer questions by written interrogatories issued by the board, but not otherwise; or

c. Conclude that a finding clearly favorable to the officer or employee is warranted; or

d. Conclude that further processing of the case through the issuance of charges and a notice of proposed removal action is necessary.

394.12 If the Loyalty Security Board on the basis of the complete file (including the report of investigation together with the interrogatory if such was requested) reaches a clearly favorable conclusion, it shall so determine and notify the Deputy Under Secretary for administration. If the Loyalty Security Board determines that the case does not warrant a finding clearly favorable to the individual, the procedures set forth in sections 394.13 through 394.18 and section 395 shall be followed.

394.13 In all cases in which the Loyalty Security Board concludes that the evidence warrants further processing with a view to possible removal action, it shall serve the officer or employee with a notice in writ-

ing of the proposed removal action which shall state the nature of the charges against him in factual detail, setting forth specifically the facts and circumstances relating to the charges so far as security considerations will permit, in order to enable the employee to submit his answer, defense, or explanation. The notice shall state also that so far as the charges relate to security they may be amended within 30 days after receipt thereof.

394.14 The notice of proposed removal action shall inform the officer or employee of his right to answer the charges in writing, under oath or affirmation, together with such statements, affidavits, or other documents as he may desire to submit within 30 calendar days from the date of receipt by the officer or employee of the notice; of his right to an administrative hearing on the charges before the Loyalty Security Board upon his request made within 15 calendar days from the date of receipt by the officer or employee of the notice of charges; of his right to appear before the Loyalty Security Board personally, to be represented by counsel or representative of his own choosing, and to present evidence by witness or affidavit in his own behalf; of his rights of appeal to the Secretary of State or his designee in the event that a decision adverse to him is made by the Loyalty Security Board, and as to the provisions governing such appeal as set forth in section 396.1.

394.15 The notice of proposed removal action given to the officer or employee shall state the employment status in which he will be carried pending the adjudication of his case; the authority or authorities under which the notice is sent; and that the proposed removal action will not become effective in less than 30 calendar days from the date of his receipt thereof. The authorities cited for proposed removal on grounds relating to loyalty shall be Executive Order 9835 and any applicable statutes, such as section 9A of the Hatch Act and or section 14 of the Veterans Preference Act of 1944; and for proposed removal on grounds relating to security shall be Public Law 733, 81st Congress, and

General Appropriations Act, 1951, Section 1213, Public Law 759, 81st Congress.

394.16 After giving the officer or employee the foregoing notice, the Loyalty Security Board shall proceed as follows:

a. If the officer or employee does not reply to the notice within the specified time by answering the charges in writing, the Loyalty Security Board shall consider the case on the complete file, make its determination, and notify the Deputy Under Secretary for administration. However, no inference or presumption should be assumed by the board because of the failure or refusal to reply to the notice of charges. Despite his failure or refusal to reply, the board shall furnish the officer or employee a notice of the time and place when the board proposes to consider his case, in order that he, together with his counsel or representative, may appear if he so desires. If the officer or employee does not reply to the charges but if he or his counsel or representative requests a hearing before the Loyalty Security Board as provided in section 394.14, he shall be granted such.

b. If the officer or employee answers the charges in writing but does not request a hearing as provided in section 394.14, the Loyalty Security Board shall consider the case on the complete file (including such answer), make its determination, and notify the Deputy Under Secretary for administration of its determination. Before making the determination, however, the board in its discretion may, if a hearing is deemed necessary, request the officer or employee to appear for a hearing, but the board cannot require him to appear, and no inference or presumption should be assumed by the board because of a failure or refusal of an individual to appear for a hearing.

c. If the officer of employee requests a hearing before the Loyalty Security Board as provided in section 394.14, a time and place for such hearing shall be set by the Loyalty Security Board, as convenient to

the officer or employee as circumstances permit, and he shall be allowed a reasonable time to assemble his witnesses and prepare his defense, and the officer or employee shall be notified thereof in writing. Only on written request from the officer or employee shall a hearing be scheduled sooner than 15 calendar days after notice thereof to such officer or employee.

394.17 The following statement shall be appended to each notice of charges and proposed removal action:

"Any and all evidence which you desire to submit in connection with the matter under consideration should be submitted at the hearing before the Loyalty Security Board. No additional testimony may, as of right, be introduced into the record on any subsequent appeal, and on such appeals additional testimony will be received only in exceptional circumstances and in the discretion of the appellate authority. It is therefore essential that you should take care to present all of your evidence, including your own testimony, at the hearing before the Loyalty Security Board if you wish the same to be thereafter considered in the event of an appeal."

394.18 No officer or employee shall be terminated until at least 30 calendar days subsequent to his receipt of the notice of charges, except as provided in section 22.2(a)(2) of Civil Service Commission Regulations.

394.2 *Cases Involving Security Only*

394.21 The Loyalty Security Board shall take action in the security cases of all officers and employees which are referred to it by the responsible authorities of the Department to determine whether such officer's or employee's removal is necessary or advisable in the interest of national security.

394.22 The Loyalty Security Board shall consider such cases in the light of the security standard and principles set forth in section 393 and may, on the basis of the record presented, make a determination in ac-

cordance with the provisions of section 394.11. The Loyalty Security Board shall then proceed as outlined in section 394.12 through 394.18 and section 395.

394.23 The Loyalty Security Board may at any time recommend to the Deputy Under Secretary for administration the summary suspension of any officer or employee in the interest of national security and may similarly recommend the reinstatement of any officer or employee who has been summarily suspended.

394.24 Any officer or employee who is summarily suspended in the interest of national security shall be notified thereof, and informed of the reasons for his suspension to the extent that the interests of national security permit. Such officer or employee shall within 30 days after such notification be given an opportunity to submit statements or affidavits to the Loyal Security Board to show why he should be restored to duty. Any officer or employee so suspended shall receive a written statement of the charges against him within 30 days after his suspension.

394.25 The statement of security charges may be amended at any time within 30 days after receipt thereof by the officer or employee. If the security charges are so amended the officer or employee may make written reply thereto within 30 days after receipt of the amended charges.

395 *Hearing Procedure and Decisions of the Loyalty Security Board*

395.1 *Statement of Charges and Right to Hearing and Appeal*

As indicated in section 394, before any officer or employee of the Department of State is removed from employment for disloyalty or as a security risk, he shall be provided with a statement of the charges against him, and be granted the right to an administrative hearing before the Loyalty Security Board and an appeal to the Secretary of State or his designee. If the finding of the Secretary of State on appeal is that there are reasonable grounds to believe that he is disloyal, he

may appeal to the Loyalty Review Board for a determination as to his loyalty. An officer or employee may, however, be suspended at any time in the interest of national security pending a determination with respect to loyalty or security risk.

395.2 *Evidence*

The Department and employee may introduce such evidence as the Loyalty Security Board may deem proper.

395.3 *Hearings*

395.31 The hearings shall be before a panel of the Loyal Security Board consisting of not less than three members of the board, one of whom shall be designated by the chairman of the board as chairman of the panel, and the action of the panel shall be that of the board.

395.32 The hearings shall be private and shall be attended only by the members of the panel of the Loyal Security Board hearing the case and other appropriate departmental officials directly connected with the adjudication of the case, representatives of the Loyalty Review Board, the officer or employee, his counsel or representative, and the witness who is testifying.

395.33 The chairman of the panel shall preside; the officer or employee shall be informed of his right to appear personally and participate in the hearing, to be represented by counsel or representative of his own choice, and either by himself or by his representative or counsel to present evidence in his own behalf, through witnesses or by affidavits. The hearing shall begin with the reading of the letter of charges and the interrogatory, if any. An introductory statement shall also be made to the effect that the transcript of the hearing will not include all material in the file of the case, in that it will not include reports of investigation conducted by the Federal Bureau of Investigation, which are confidential, nor will it contain information concerning the identity of confidential informants or

information which would reveal the source of confidential evidence, but that the transcript will contain only the evidence in the letter of charges and the interrogatory, if any, and the evidence taken at the hearing.

395.34 Testimony shall be given under oath or affirmation. Members of the panel may ask such questions of the officer or employee and his witnesses as they may desire.

395.35 A verbatim record will be made of the proceedings by a person or persons designated by the Loyal Security Board and no other transcript shall be made. Such transcript shall be made a permanent part of the record in the case. A copy of the transcript will be provided to the officer or employee upon request.

395.36 Strict legal rules of evidence will not be applied at such hearing, but reasonable bounds shall be maintained as to competency, relevancy, and materiality.

395.4 *Consideration of Decision*

395.41 After the officer or employee has been given a hearing and after the record thereof has been reduced to writing, the panel will convene as promptly as possible in executive session to reach a decision.

395.42 In reaching its decision, the panel shall be governed by the loyalty standard provided in section 392 and/or the security standard and principles provided in section 393, as appropriate, depending on the nature of the case as set forth in the notice of charges and the evidence submitted. After consideration of the complete file and following any desired discussion, the decision shall be by majority vote and the vote of each member shall be recorded.

395.43 In arriving at its decision, the panel shall take into consideration the fact that the employee may have been handicapped in his defense by the nondisclosure to him of confidential information or by the lack of opportunity to cross-examine persons constituting such sources of information.

(5-4-51)

395.5 *Decision*

395.51 The decision of the panel acting for the Loyalty Security Board shall be one of the following:

a. The Loyalty Security Board determines that, on all the evidence, reasonable grounds do not exist for belief that the officer or employee is disloyal to the United States Government under the loyalty standard referred to in section 392, or for belief that his removal is necessary or advisable in the interest of national security under the security standard and principles referred to in section 393, and determines that the case be closed; or

b. The Loyal Security Board determines that, on all the evidence, reasonable grounds exist for belief that the officer or employee is disloyal to the United States Government under the loyalty standard referred to in section 392, and for belief that his removal from employment is necessary or advisable in the interest of national security under the security standard and principle provided in section 393, and determines that he be separated from employment; or

c. The Loyalty Security Board determines that, on all the evidence, reasonable grounds do not exist for belief that the officer or employee is disloyal to the United States Government under the loyalty standard referred to in section 392, but reasonable grounds exist for belief that the officer's or employee's removal from employment is necessary or advisable in the interest of national security under the security standard and principles provided in section 393, and determines that he be separated from employment; or

d. The Loyalty Security Board determines that, on all the evidence, reasonable grounds do not exist for belief that the officer's or employee's removal from employment is necessary or advisable in the interest of national security under the security standard and principles provided in section 393, and determines that the case be closed; or

c. The Loyalty Security Board determines that, on all the evidence, reasonable grounds exist for belief that the officer's or employee's removal from employment is necessary or advisable in the interest of national security under the security standard and principles provided in section 393, and determines that he be separated from employment.

395.52 The decision of the Loyalty Security Board shall be made in writing and shall be signed by the members of the panel of the Loyalty Security Board deciding the case. It shall state the action taken and shall be made a permanent part of the record. In making its determination in every unfavorable loyalty case, the panel shall state in writing whether or not the case falls within the purview of section 9A of the Hatch Act and the applicable appropriation act. There shall accompany the board's decision in all cases involving loyalty (1) a memorandum showing the reasons for arriving at the favorable or unfavorable determination, and (2) a statement that the provisions of Loyalty Review Board Memorandum No. 41, Revised, to All Executive Departments and Agencies, of April 17, 1950, with respect to inviting witnesses to attend the hearing and testify, have been complied with. Such memorandum and statement shall be made a part of the confidential file, but shall not be a part of the written decision and shall in no instance be furnished to the employee or his counsel. The complete file shall be classified as confidential and transmitted to the Deputy Under Secretary for administration.

395.53 The Loyalty Security Board may recommend the suspension of an officer or employee on loyalty grounds after a determiantion unfavorable as to loyalty (subsequent to the serving of a notice of proposed removal and reply, if any, and hearing, if held) except in cases where the circumstances are such that the retention of the officer or employee in an active duty status may be detrimental to the interests of the Government. In such exceptional circumstances, the board

may recommend at any time that the officer or employee be temporarily assigned to duties in which this condition would not exist, or placed on annual leave, provided he has sufficient leave to his credit to cover the required period, placed on leave without pay with his consent, or suspended on loyalty grounds.

395.6 *Notification by Deputy Under Secretary for Administration*

Upon receipt of the complete file, including the decision of the Loyalty Security Board, the Deputy Under Secretary for administration will notify the officer or employee in writing of the Loyalty Security Board's decision. If the decision is favorable with respect to loyalty, and notification is given prior to post-audit by the Loyalty Review Board, such notice shall state that the loyalty determination is subject to post-audit by the Loyalty Review Board. If the decision is unfavorable, notification shall be in accordance with the provisions of section 396.11.

396 *Appeals*

396.1 *Procedure on Appeal*

396.11 If the decision of the Loyalty Security Board requires separation from employment for disloyalty and in the interest of national security, or only in the interest of national security, the officer or employee shall be so notified in writing by the Deputy Under Secretary for administration and advised in writing of his right to appeal to the Secretary of State or his designee in writing within 10 calendar days after receipt of such notification. If the decision of the Loyalty Security Board requires separation from employment only in the interest of national security, the notice shall state that it has been determined that on all the evidence, reasonable grounds do not exist for belief that the officer or employee is disloyal to the United States Government, but that the determination as to

loyalty is subject to post-audit by the Loyalty Review Board.

396.12 Upon the exercise by the officer or employee of such right of appeal, the Secretary or his designee will hear the officer or employee on his appeal at a date not earlier than 1 week after receipt by the Secretary of written notice of appeal. This hearing shall be private and shall be attended only by the Secretary and/or his designee, the officer or employee, and a single counsel or representative of his own choosing. The appeal shall be on the record, but the officer or employee shall be permitted to appear personally and, either by himself or his counsel or representative, to present a statement or brief in his own behalf. No witnesses will be heard by the Secretary or his designee. A verbatim record will be made of the proceedings, and a copy of the transcript will be provided to the officer or employee upon request.

396.13 If during the course of an appeal, the Secretary of State is of the opinion that further evidence should be taken; amplification of the record should be made; or further investigation should be conducted, he may remand the case for reconsideration by the Loyalty Security Board and for such taking of further evidence; amplification of the record; or requesting of further investigation, as he may direct.

396.2 *Favorable Decision by the Secretary of State*

396.21 If as a result of an appeal, the Secretary of State decides that reasonable grounds do not exist for belief that the officer or employee is disloyal to the United States Government under the loyalty standard referred to in section 392, or for belief that his removal is necessary or advisable in the interest of national security under the security standard and principles referred to in section 393, he may direct that the case be closed.

396.22 If the Secretary of State decides that reasonable grounds do not exist for belief that the officer's or employee's removal is necessary or advisable in the

interest of national security under the security standard and principles referred to in section 393, he may direct that the case be closed.

396.23 If the decision of the Secretary of State is favorable to the officer or employee, he shall be so notified in writing. Such officer or employee shall be restored to duty, if suspended, and the record shall show such decision. In cases involving loyalty, the notice shall state that the determination as to loyalty is subject to post-audit by the Loyalty Review Board.

396.3 *Unfavorable Decision by the Secretary of State*

396.31 If as a result of an appeal, the Secretary of State decides that reasonable grounds exist for belief that the officer or employee is disloyal to the United States Government and for belief that his removal is necessary or advisable in the interest of national security; or that reasonable grounds exist for belief that the officer's or employee's removal is necessary or advisable in the interest of national security, and that he should therefore be separated from employment, the officer or employee shall be so notified in writing setting forth the authority or authorities under which he is to be terminated. Such notice shall state that the decision of the Secretary of State as to the issue of security is final.

396.32 If the decision is that reasonable grounds exist for belief that the officer or employee is disloyal to the United States Government and for belief that his removal is necessary or advisable in the interest of national security, such notice shall state that, so far as the loyalty determination is concerned, the officer or employee has a right to appeal in writing to the Loyalty Review Board within 20 calendar days after the receipt of the notice in the case of persons living within the continental United States and within 30 calendar days in cases of persons living outside the continental limits of the United States.

396.33 In the event that the officer or employee submits an appeal to the Loyalty Review Board, he shall forthwith give notice thereof to the Secretary of State.

396.4 *Action on Findings of the Loyalty Review Board*

396.41 If, on appeal to the Loyalty Review Board, that board finds that reasonable grounds exist for belief that the officer or employee is disloyal, the Department will take prompt administrative action to remove him from employment.

396.42 If, on appeal to the Loyalty Review Board, that board finds that reasonable grounds do not exist for belief that the officer or employee is disloyal, the Secretary of State may, taking into account the interest of national security:

a. Restore the officer or employee to duty, if suspended, and close the case; or

b. Terminate the employment of the officer or employee under the authority referred to in Section 391.3.

396.43 Prior to taking final action under section 396.42, the Secretary of State may refer the case to the Loyalty Security Board and obtain a recommendation whether the officer or employee should be separated from employment in the interest of national security.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12,958

JOHN S. SERVICE, APPELLANT

v.

JOHN FOSTER DULLES, *et al.*, APPELLEES

Appeal from the United States District Court for the District of Columbia

Decided June 14, 1956

Mr. C. E. Rhetts for appellant.

Mr. Donald B. MacGuineas, Attorney, Department of Justice, with whom *Mr. Paul A. Sweeney*, Attorney, Department of Justice, was on the brief, for appellees.

Before WILBUR K. MILLER, WASHINGTON and BASTIAN, Circuit Judges.

BASTIAN, *Circuit Judge:* This is an appeal from a judgment granting defendants' (appellees') motion for summary judgment.

Plaintiff (appellant) was formerly a Foreign Service officer, who was dismissed by action of former Secretary of State Acheson. Appellees are the present Secretary of State, members of the Civil Service Commission, and the former members of the Loyalty Review Board of the Civil Service Commission, established by Executive Order No. 9835.

Appellant filed this suit to obtain a judgment declaring his discharge void and invalid; to obtain reinstatement to his employment and his salary from the date of his discharge to the date of his reinstatement; for the expunging from the record of statements reflecting that this dismissal had been on the ground that there was or is reasonable doubt as to his loyalty to the Government of the United States; and for certain other relief. On cross-motions for summary judgment, the District Court dis-

missed the case as moot as to the former members of the Loyalty Review Board of the Civil Service Commission as that Board had ceased to exist and, as to them, the action had abated; directed the Civil Service Commission to expunge from its record the Loyalty Review Board's finding that there was reasonable doubt as to appellant's loyalty to the Government of the United States; granted appellees' cross-motion for summary judgment and denied appellant's motion for summary judgment.

The record discloses that under date of March 24, 1950, the Chairman of the Loyalty Security Board of the Department of State notified appellant that a hearing had been scheduled under § 395 of the Regulations and Procedures of the Department of State to consider charges against him "with a view to making a recommendation to the Secretary of State whether or not, under the provisions of the Department of State Appropriation Act, 1950, Section 104 Public Law 179, 81st Congress, First Session,[1] your [his] employment in the Department should be terminated in the interest of the United States." The letter setting forth the notification of charges read in part as follows:

> "'Under date of March 21, 1947, the President issued Executive Order 9835 prescribing procedures for the administration of an Employee Loyalty Program in the Executive Branch of the Government. Under date of March 11, 1949, the Department of State promulgated regulations and procedures, a copy of which is attached, setting forth the revised loyalty and security principles and procedures relating to employees of the Department of State.
>
> "In the course of investigations conducted pursuant

[1] Public Law 179, Sec. 104, provides as follows: "Sec. 104. Notwithstanding the provisions of section 6 of the Act of August 24, 1912 (37 Stat. 555), or the provisions of any other law, the Secretary of State may, in his absolute discretion, during the current fiscal year, terminate the employment of any officer or employee of the Department of State or of the Foreign Service of the United States whenever he shall deem such termination necessary or advisable in the interests of the United States." (63 Stat. 456.)

to this loyalty and security program certain information has been received by the Department of State which, after initial consideration by the Loyalty Security Board of the Department of State, necessitates the formulation of a charge against you. . . ."

The specific charges were appellant's disloyalty to the United States and the claim that he was a security risk.

Following extensive hearings, the State Department Loyalty Board concluded that reasonable grounds did not exist for believing that appellant was disloyal to the United States and that he did not constitute a security risk to the Department of State. This was approved by the Deputy Under Secretary of State.

After the issuance of Executive Order No. 10241, amending the standard established by Executive Order No. 9835 for removal from employment on loyalty grounds, the Loyalty Security Board of the Department of State again considered appellant's case and determined that, under Executive Order No. 10241, no reasonable doubt existed as to appellant's loyalty to the United States. This decision likewise was approved by the Deputy Under Secretary of State.

Thereafter, the Loyalty Review Board of the Civil Service Commission advised appellant that it would hold a new hearing based on the charges filed by the Department of State Loyalty Security Board; and, after intermediate proceedings, the Civil Service Commission Loyalty Review Board rendered its opinion, holding that there was reasonable doubt about appellant's loyalty. The action subsequently taken by Secretary Acheson appears from his affidavit filed in the District Court, as follows:

"3. On that same day I considered what action should be taken in the light of the opinion of the Loyalty Review Board, recognizing that whatever action taken would be of utmost importance to the administration of the Government Employees Loyalty Program. I understood that the responsibility was vested in me to make the necessary determination under both Executive Order No. 9835, as amended, and under

Section 103 of Public Law 188, 82d Congress, as to what action to take.

"4. Acting in the exercise of the authority vested in me as Secretary of State by Executive Order 9835, as amended by Executive Order 10241, and also by Section 103 of Public Law 188, 82d Congress (65 Stat. 575, 581), I made a determination to terminate the services of Mr. Service as a Foreign Service Officer in the Foreign Service of the United States.

"5. I made that determination solely as the result of the finding of the Loyalty Review Board and as a result of my review of the opinion of that Board. In making this determination, I did not read the testimony taken in the proceedings in Mr. Service's case before the Loyalty Review Board of the Civil Service Commission. I did not make any independent determination of my own as to whether on the evidence submitted before those boards there was reasonable doubt as to Mr. Service's loyalty. I made no independent judgment on the record in this case. There was nothing in the opinion of the Loyalty Review Board which would make it incompatible with the exercise of my responsibilites as Secretary of State to act on it. I deemed it appropriate and advisable to act on the basis of the finding and opinion of the Loyalty Review Board. In determining to terminate the employment of Mr. Service, I did not consider that I was legally bound or required by the opinion of the Loyalty Review Board to take such action. On the contrary, I considered that the opinion of the Loyalty Review Board was merely an advisory recommendation to me and that I was legally free to exercise my own judgment as to whether Mr. Service's employment should be terminated and I did so exercise that judgment... ..."

The Supreme Court, in *Peters* v. *Hobby*, 349 U. S. 331 (1955), held that the power of the Loyalty Review Board of the Civil Service Commission was limited to "persons recommended for dismissal on grounds relating to loyalty by the Loyalty Board of any department or agency." Ac-

cordingly, the District Court held that the decision of the Loyalty Review Board was a nullity in a case where (like the present one) no such recommendation for dismissal had been made.

The appellant argues that the discharge was unlawful because the Secretary's action must be sustainable on the grounds which he invoked to support it; further, "by relying 'solely' on the invalid finding of the Loyalty Review Board and failing to make an independent determination on all the evidence and by denying appellant an opportunity to appeal to him, the Secretary violated his own regulations prescribing the manner in which he would exercise his McCarran Rider [2] authority and thereby denied appellant the procedural and substantive guarantees of these regulations." It is also argued that the Secretary, "exercised his discretion under the McCarran Rider, if at all, in an arbitrary and illegal manner in that he misapprehended the legal validity of the Loyalty Review Board finding on which he relied 'solely' and in that he failed to make an independent determination of his own that appellant's discharge was necessary or advisable in the interests of the United States."

Beginning in 1947 and continuing through the time covered by appellant's dismissal, Congress had enacted riders, all similar to Section 104, Public Law 179, quoted in note 1, *supra*, to the several appropriations acts covering the State Department, authorizing the Secretary of State to summarily dismiss officers and employees of that department "whenever he shall deem such termination necessary or advisable in the interests of the United States." [3]

The notice of termination of appellant's employment stated that such action was taken pursuant to the above quoted provision for summary dismissal *as well as* under Executive Order No. 9835, as amended by Executive Order No. 10241. The Secretary of State, in his affidavit filed

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[2] The term "McCarran Rider" has reference to Sec. 104, Public Law 179, note 1, *supra*, and similar subsequent enactments.

[3] We recently held a similar statute to be constitutional in the case of *Scher* v. *Weeks*, Secretary of Commerce, decided January 19, 1956, —— U.S. App. D.C. ——, 231 F.2d 494, cert. denied, June 4, 1956, —— U.S. ——.

in the District Court, stated that his action was taken under Executive Order No. 9835, as amended by Executive Order No. 10241, *and also* under Section 103 of Public Law 188, 82d Congress (the same provision as Section 104 of Public Law 179, 81st Congress, note 1, *supra*.)

As well expressed by Judge Curran, of the District Court:

> "This Court cannot, of course, review the correctness of the former Secretary of State's determination. Its function is limited to detemining whether any procedural requirement of the statute was violated in plaintiff's discharge.
>
> "Under Public Law 188 there was one procedural requirement: that the Secretary of State must determine in his discretion that the termination of plaintiff's employment was necessary or advisable in the interests of the United States. That determination the former Secretary of State made.
>
> "Plaintiff's contention that by virtue of the State Department's regulations he could not be dismissed under Public Law 188 unless the procedures prescribed by Executive Order 9835 were followed is without merit. It was not the intent of Congress that the Secretary of State bind himself to follow the provisions of Executive Order 9835 in dismissing employees under Public Law 188. This power of summary dismissal would not have been granted the Secretary of State by the Congress if the Congress was satisfied that the interests of this country were adequately protected by Executive Order 9835.
>
> "Under Public Law 188 plaintiff could have been summarily dismissed without notice of charges, hearing, or appeal."

The District Court then concluded that appellant was validly discharged under Public Law 188. Under the circumstances of this case, we must agree.

We also think that the District Court was entirely correct in directing the Civil Service Commission to expunge from its record the Loyalty Review Board's finding that there was reasonable doubt as to appellant's loyalty to the

United States as, under the *Peters* case, *supra*, the action of that Board was a nullity.[4]

The judgment of the District Court is Affirmed.

(1026-4)

[4] It is only fair to add that since the finding of the Review Board is a nullity, and since appellant's discharge is sustained only under Public Law 188, the following quotation from note 2 in *Scher* v. *Weeks*, *supra*, would seem equally applicable in this case: "It should be noted, however, that in the case at bar appellant's discharge carries no implication that he might be either disloyal or a security risk."